WILLKIE FARR & GALLAGHER

Washington, DC
New York
London
Paris

DOCKET FILE COPY ORIGINAL

February 2, 1998

Ms. Deborah Klein
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
7th Floor
Washington, D.C. 20554

Re: Program Access NPRM, CS Docket No. 97-248; RM No. 9097

Dear Ms. Klein:

Enclosed is a copy of the comments of Home Box Office ("HBO") filed today in the above-captioned proceeding. I have also enclosed a diskette that contains this document in WordPerfect for DOS, 5.1 format. The diskette is formatted as read only.

Please call me with any questions you may have about this filing.

Sincerely,

Michael H. Hammer

Michael H. Hammer

Enclosure

No. of Copies rec'd 0+6
List ABCDE

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 97-248
and Competition Act of 1992	)	
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	RM No. 9097
Regarding Development of	)	
Competition and Diversity in	)	
Video Programming Distribution	)	
and Carriage	)	

COMMENTS OF HOME BOX OFFICE

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-8000

Its Attorneys

February 2, 1998

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 97-248
and Competition Act of 1992	)	
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	RM No. 9097
Regarding Development of	)	
Competition and Diversity in	)	
Video Programming Distribution	)	
and Carriage	)	

COMMENTS OF HOME BOX OFFICE

Home Box Office ("HBO") files these comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

HBO does not oppose changes to the program access rules that could increase the efficiency of the rules or eliminate needless regulations. However, HBO does oppose expanding the rules where

---

[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, FCC 97-415 (released December 18, 1997) ("Notice").

doing so would add unnecessary complexities or encourage the filing of unmeritorious claims.

For example, HBO does not oppose establishing appropriate deadlines for resolution of program access complaints, provided that such deadlines do not compromise the complaint process. Similarly, HBO does not oppose eliminating the requirement that buying groups provide joint and several liability, so long as programmers may still impose on buying groups other reasonable requirements relating to creditworthiness.

Likewise, HBO agrees with the Commission that there is no need to amend the current program access discovery procedures. Ameritech calls for discovery as of right because it believes that complainants cannot obtain sufficient information to prosecute complaints. This assertion ignores the fact that the Commission already has the power to compel discovery when it is necessary. The Commission never has denied discovery to a complainant that could show a reasonable need for it and has successfully resolved program access disputes without discovery in all but two instances.

HBO does oppose the proposal to amend the rules to provide for damages. Ameritech argues for damages because it believes price discrimination is widespread among satellite programmers and damages are a necessary tool to force programmers to resolve their differences with non-cable MVPDs. The facts simply do not support these assertions. First, there is no evidence that

program access violations are widespread. To the contrary, in the five year history of the rules, there has been only one Commission decision finding that a programmer violated the pricing restrictions. Second, sixty percent of all program access complaints resolved to date have been settled by the parties prior to Commission decision. Third, the Commission has never found it necessary to use its existing forfeitures remedy, so it is hard to understand why it would need to adopt a new damages remedy. Thus, the facts demonstrate that discrimination is not widespread, the program access rules already provide incentives for parties to resolve their disputes, and the Commission currently has the authority to compel the resolution of such disputes.

Moreover, based on over twenty years of negotiating with program distributors, HBO believes that both the damages and discovery proposals would create significant and unhealthy new incentives to bring unmeritorious program access cases. First, some MVPDs would undoubtedly be encouraged to file unmeritorious complaints solely because they believe that the threat of damages will enable them to force unjustified concessions from programmers. Second, discovery as of right would create a pernicious but inviting opportunity for MVPDs to obtain valuable and sensitive commercial information about the cost structure of their competitors. Consequently, the number of program access disputes the Commission will have to referee would increase, a

particularly troublesome result given the complicated and fact-intensive nature of damages and discovery proceedings.

In the absence of any showing that the program access rules need overhauling, HBO urges the Commission to avoid any changes in the rules that would burden the parties and the Commission with cumbersome, adjudicatory processes that, instead of fostering competition in the marketplace, would only encourage complaints as a means of gaining unjustified leverage in negotiations and obtaining access to competitive information. The proposed changes are particularly unwarranted since they would also delay, rather than expedite, the resolution of program access complaints.

II. HBO DOES NOT OPPOSE THE COMMISSION ESTABLISHING DEADLINES FOR THE RESOLUTION OF PROGRAM ACCESS COMPLAINTS, PROVIDED THAT SUCH DEADLINES DO NOT COMPROMISE THE COMPLAINT PROCESS.

HBO agrees with Ameritech that there is a benefit to resolving program access complaints on an expedited basis. Programmers, as well as MVPD complainants, would benefit from the certainty that would result from expeditious resolution of complaints. Thus, HBO generally supports Commission efforts to make the program access rules more efficient and streamlined.

However, HBO does not share Ameritech's criticism of the Commission's handling of program access disputes. HBO notes, for example, that the Commission needed only four months to resolve

Ameritech's unsuccessful 1996 program access complaint against HBO and Continental.[2] In addition, the one price discrimination case in which a complainant prevailed was resolved in nine months.[3] These time periods can hardly be said to be unreasonable, given the complexities involved in program access disputes, and appear entirely consistent with Congress' goal of providing for the expeditious review of complaints.[4]

If the Commission nonetheless chooses to adopt strict time-frames for resolving program access complaints, it should keep in mind the practical consequences that could flow from such deadlines. Program access disputes can be very complicated, involving substantial legal and economic analysis.[5] Any deadlines the Commission sets must account for these complexities and give the parties (complainants as well as defendants) sufficient time to develop and present their positions. Failure

---

[2] See Corporate Media Partners, 11 F.C.C.R. 7735 (1996), aff'd, 12 F.C.C.R. 3455 (1997).

[3] Corporate Media Partners v. Rainbow Programming Holdings, Inc., CSR 4873-P, DA 97-2040 (1997).

[4] See 47 U.S.C. § 548(f)(1). Indeed, resolution within 9 months is well within the 12-month statutory deadline Congress has imposed on the resolution of common carrier complaints. See 47 U.S.C. § 208.

[5] See, e.g., EchoStar Communications Corporation v. Fox/Liberty Networks, Program Access Complaint, CSR 5165-P (filed October 27, 1997). (20-page complaint contained thirteen separate exhibits and made sweeping challenges to the programmer's pricing methodologies).

to do so would compromise the Commission's ability to engage in reasoned decision-making and raise serious due process issues.

In this regard, HBO strongly disagrees with Ameritech's proposal that the time for programmers to respond to a complaint be shortened from 30 days to 20 days. As the Commission has stated, there are "myriad circumstances" at issue in resolving program access complaints.[6] Thus, the current 30 day deadline for response often will allow insufficient time for a programmer to martial the facts and analysis necessary to defend against a program access complaint. This is particularly true if, as is often the case, the programmer provides a separate economic analysis as part of its defense. It would be patently unfair to limit the ability of programmers to formulate such detailed responses by imposing unreasonable time restraints, especially given that there are no similar restraints on the complainant's ability to draft a complaint.

Similarly, the Commission must be careful that any program access deadlines not reduce the opportunity for private settlement of program access disputes by the parties. The Commission has been highly successful at encouraging resolution of program access complaints through the private negotiation of the parties. Of the 30 complaints resolved to date, 18 (or 60%) have been settled by the parties prior to a Commission decision.

---

[6] Notice at ¶ 39.

As the Commission has stated, such private settlements are in the public interest, not only because they preserve Commission resources but also because they allow good faith negotiations rather than federal regulation to dictate the terms and conditions of carriage.[7] However, settlement negotiations often require adequate time for the parties to sit down and work out their differences.[8] It is therefore critical that the Commission retain the flexibility to freely extend and otherwise modify its resolution deadlines as circumstances warrant.

Finally, as discussed more fully below, Ameritech's request for quicker resolution of program access disputes is at odds with its request for expanded discovery. Discovery substantially lengthens and complicates the time for resolving disputes among litigants. The Commission recently recognized in its Common Carrier Complaint Order that expansive discovery cannot co-exist with the type of tight resolution deadlines Ameritech proposes.[9]

---

[7] See id. at ¶ 37.

[8] See id. (noting that settlement often requires substantial delays in the program access proceedings).

[9] See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order, CC Docket No. 96-238, FCC 97-396, at ¶ 115 (released November 25, 1997) ("Common Carrier Complaint Order").

III. HBO DOES NOT OPPOSE ELIMINATING THE REQUIREMENT THAT BUYING GROUPS PROVIDE JOINT AND SEVERAL LIABILITY, SO LONG AS PROGRAMMERS MAY STILL IMPOSE ON BUYING GROUPS OTHER REASONABLE REQUIREMENTS RELATING TO CREDITWORTHINESS.

HBO does not oppose the Commission's proposal to eliminate the requirement that buying groups provide joint and several liability. In HBO's experience, buying groups are often able to offer sufficient guarantees of creditworthiness without agreeing to joint and several liability.

However, if the Commission chooses to eliminate joint and several liability, it must do so in a manner that adequately preserves the programmer's right to demand financial assurances as part of any programming agreement with a buying group.[10] Thus, the Commission must clarify that removal of the joint and several liability requirement does not in any way affect the ability of the programmer to demand, to its satisfaction, sufficient assurances of creditworthiness and financial stability under Section 76.1002(b)(1) of the Commission's rules.[11]

---

[10] As Congress indicated, nothing in Section 628 is intended to interfere with a programmer's ability to impose "reasonable requirements for creditworthiness, offering of service, and financial stability." 47 U.S.C. § 548(c)(2)(B)(i).

[11] See 47 U.S.C. § 76.1002(b)(1).

IV. HBO AGREES WITH THE COMMISSION THAT THERE IS NO JUSTIFICATION FOR CHANGING THE CURRENT POLICY REGARDING DISCOVERY IN PROGRAM ACCESS DISPUTES.

Changes to the Commission's current discovery policy are neither necessary nor desirable. Neither Ameritech nor any other party has demonstrated how expanding the right to discovery in program access proceedings would in any way further the goals of Section 628. In fact, such expanded discovery would conflict directly with Congress's goals in adopting Section 628.

A. The Program Access Rules Already Allow For Adequate Discovery Where Necessary.

The Commission's current rules allow it full discretion to authorize discovery when necessary to the resolution of a particular program access case.[12] In this manner, the Commission is given the flexibility to avoid time-consuming discovery except where the particular circumstances of the case create a need for production of specific information. Indeed, the Commission has permitted discovery in two recent program access cases.[13] Moreover, HBO is not aware of any instance in which a complainant

---

[12] See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order, MM Docket No. 92-265, 8 F.C.C.R. 3359 at ¶ 81 (1993) at ¶ 94.

[13] See National Rural Telecommunications Cooperative v. EMI Communications Corp., 10 F.C.C.R. 9785 (1995)("NRTC v. EMI"); Satellite Receivers, Ltd., Consumer Satellite Systems, Turner Vision, Inc., and Programmers Clearing House v. Cable News Network, CSR Nos. 4685-P, 4686-P, 4684-P, 4706-P (consolidated 1996)("Satellite Receivers v. CNN").

MVPD requested additional discovery and was denied.

Perhaps the best testimony for why changes to the discovery rules are unnecessary is the Commission's ability to effectively resolve the overwhelming majority of program access disputes without any discovery whatsoever. Of the 38 program access complaints filed in the last five years, in only five instances have the complainants even asked for any form of discovery.[14] Given this consistent record of effectively resolving program access disputes with current discovery rules, changes to these rules are clearly unwarranted. HBO concurs with the Commission's conclusion that the current system of "Commission-controlled discovery has worked adequately . . . and will continue to serve the public interest best."[15]

B. Expanded Discovery in Program Access Proceedings Would Undermine The Goals of Section 628.

Congress dictated that the Commission's program access rules: 1) provide an efficient, streamlined means of resolving program access disputes; and 2) rely, to the maximum extent

---

[14] See NRTC v. EMI, 10 F.C.C.R. 9785 (1995); Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C. and Tele-Communications, Inc., DA 97-2693, filed Dec. 24, 1987; Satellite Receivers v. CNN, CSR Nos. 4685-P, 4686-P, 4684-P, 4706-P (consolidated 1996); EchoStar Communications Corp. v. Fox/Liberty Networks, L.L.C., Fox Sports Net, L.L.C., Fox Sports Direct, CSR No. 5138-P (filed Oct. 29, 1997); EchoStar Communications Corp. v. Rainbow Media Holdings, Inc. and Rainbow Programming Holdings, Inc., CSR No. 5127-P (filed Oct. 29, 1997).

[15] Notice at ¶ 44.

feasible, on the marketplace.[16] Adopting Ameritech's proposal to grant discovery as a matter of right would severely undermine both of these goals.

1. Expanded Discovery Would Impose Significant Delays and Costs On Program Access Proceedings.

Expansion of discovery would be entirely antithetical to Congress' directive that program access cases be resolved expeditiously. HBO's experience with the discovery process fully supports the Commission's recent statement that "discovery has been the most contentious and protracted component of the formal complaint process."[17] "Discovery is inherently time-consuming and often fails to yield information that aids in the resolution of a complaint."[18] Moreover, discovery is "susceptible to abuses that often caused undue delays in [the] consideration of the merits of a complainant's claims."[19]

These conclusions are borne out by certain extraordinarily broad discovery requests currently pending before the Commission.[20] Such requests encompass a vast amount of

---

[16] See 1992 Cable Act, § 2(b)(2). See also 102 Cong. Rec. H6541 (daily ed. July 23, 1992) (comments of Rep. Harris in support of the Tauzin Amendment) (noting that Section 628 was not designed to set prices, but rather to preserve the ability to engage in good faith negotiations).

[17] Common Carrier Complaint Order at ¶ 102.

[18] Id. at ¶ 101.

[19] Id. at ¶ 115.

[20] See EchoStar Communications Corporation v. Fox/Liberty (continued ...)

information unnecessary to the resolution of the program access complaint. As a result, these requests undoubtedly would be opposed, and the parties would spend weeks debating the reasonable scope of discovery before the Commission. In the end, it would be the Commission's job to step in and specify what discovery was both necessary and permissible. Thus, the discovery process "would almost inevitably devolve into Commission-controlled discovery"[21] -- the very form of discovery for which the current rules already provide.

2. Expanded Discovery Would Unnecessarily And Irreparably Compromise The Ability Of Programmers To Negotiate With Their Distributors.

In addition to the above concerns, expanded discovery would significantly interfere with the ability of programmers to engage in permissible, good-faith negotiations with MVPDs. As the Commission has recognized, programming is not an interchangeable commodity.[22] Rather, each party to a programming transaction brings different benefits and different needs to the table. Reaching a mutually beneficial agreement for the distribution of

---

(... continued)
Networks, L.L.C. et al., File No. CSR-5138-P, "EchoStar's First Request For the Production of Documents," filed December 30, 1997.

[21] Notice at ¶ 44.

[22] See Program Access Order at ¶ 100 (acknowledging that reaching agreements with different MVPDs requires the flexibility to fashion creative terms for the distribution of programming).

the programming depends on the ability of the parties to fashion individual agreements through good faith negotiations.

Of critical importance in fashioning such agreements is strict confidentiality regarding the terms and rates discussed. Without protection from disclosure, programmers would be deprived of all flexibility in fashioning deals with different MVPDs. The most advantageous term of each negotiated agreement would, if disclosed, become the lowest common denominator of the next negotiation with another party, whether warranted or not. As the Commission has recognized:

> [D]isclosure of [programming] contracts could result in substantial competitive harm. Release of the contracts . . . would provide other carriers with key contractual provisions that they can use in tailoring competitive strategies. Moreover, disclosure could adversely affect the subject carriers' negotiating posture with . . . distributors and might disrupt the carriers' business relationship with . . . distributors currently under contract with the carriers.[23]

Discovery as a matter of right would force programmers to produce contracts and other proprietary, sensitive, and confidential business information to complaining MVPDs upon the mere filing of a program access complaint. Such easy access to a programmer's carriage contracts would provide a strong incentive for even the most scrupulous of MVPDs to file a program access

---

[23] National Rural Telephone Cooperative on Request for Inspection of Records, Memorandum Opinion and Order, 5 F.C.C.R. 502, at ¶ 12 (1990). See also OVS Order, 11 F.C.C.R. 18223 at ¶ 132 ("making carriage contracts public would stifle competition [and] divulge sensitive information.").

complaint in order to gain a competitive advantage in contract negotiations. For these reasons, the Commission has consistently determined that programming contracts should not be routinely available through discovery because "the production of [programming contracts] would unnecessarily risk the disclosure of sensitive business information."[24]

Nor can this problem of disclosure be solved through the simple use of protective orders. Regardless of how effective the protective order may be, it remains highly likely that the confidential business information would later be used against the submitting party. For example, it is not uncommon for a single attorney to represent more than one MVPD. If that attorney gains information about a programmer in a program access proceeding through discovery, there is simply no way for the Commission or the programmer to prevent that knowledge from being used to the advantage of that attorney's other MVPD clients. Even if sanctions ultimately are imposed on the attorney for breaching the protective order, that may provide little comfort to the programmer whose proprietary information is divulged. Thus, even the possibility of discovery (and eventual disclosure) would severely restrict HBO's ability to fashion mutually beneficial agreements with different MVPDs.

---

[24] May 26, 1995 Letter from Meredith Jones to Wesley R. Heppler and Paul Glist, 10 F.C.C.R. 9433, 9434 (1995).

Compromising the ability of programmers to freely negotiate in this matter would be entirely inconsistent with the public interest and the purposes of Section 628. As the Commission has stated, Congress' directive to "'rely on the marketplace, to the maximum extent feasible, to achieve greater availability' of the . . . programming"[25] requires that the program access rules not preclude "legitimate business practices common to a competitive marketplace."[26] Thus, "it is essential to identify and preserve legitimate differences in pricing behavior so that programming vendors may continue to market their services creatively to all distribution technologies and achieve widespread availability and penetration to all subscribers."[27] Consistent with this policy, the Commission should deny Ameritech's request for expanded discovery in program access proceedings.

3. The Proposed Standardized Protective Order Would Not Provide Adequate Protections for the Confidential Information Likely to be the Object of Discovery in Program Access Complaint Proceedings.

Finally, there are other potentially significant problems with protective orders in terms of securing confidential information, and particularly with the type of standardized

---

[25] Program Access Order at ¶ 100 (quoting 1992 Cable Act, Section 2(b)(2)).

[26] Id.

[27] Id.

protective order attached to the Notice. HBO submits that it would be preferable to follow the practice in judicial proceedings of tailoring protections to the particular circumstances, with due regard to the Commission's relatively limited ability to monitor and enforce compliance with such an order in a complaint process in comparison to the ability of a court to do so.

The proposed standardized order appended to the Notice fails to provide some crucial protections typical of those applied in judicial proceedings and analogous administrative proceedings. For example, it allows access to an overly broad class of persons. Given the sensitivity of the information likely to be in issue, access should be strictly limited to outside counsel representing formal parties to the proceeding. In-house counsel access should not be allowed except on a showing of unusual need, and even then should be limited to in-house attorneys who certify that they have no involvement whatsoever in business decisionmaking or negotiations. Non-attorneys other than outside consultants and experts should never be allowed access to confidential material unless the submitting party specifically consents. Consultants and experts should be allowed access only if they certify that they do not and will not in the future provide services to competitors of the submitting party. Under no circumstances should parties be required to agree to unilateral disclosure by the Commission to "[a]ny person

designated by the Commission in the public interest, upon such terms as the Commission may deem proper."

There is a real question as to how the Commission could practically enforce the protections of such an order, particularly as to persons that are not licensees or attorneys who regularly practice before the Commission. The sort of sanctions that the Commission could impose on a non-licensee, and the delay that would inhere in the imposition of them, would likely make the threat of such sanctions essentially toothless. Compared to the summary contempt powers of a federal or state court, the Commission's powers under Section 401 of the Communications Act, 47 U.S.C. § 401, are far less efficacious and far more difficult and time-consuming to bring to bear. The opportunity for the submitting party to enforce the order as a contract is likewise inadequate due to the uncertainty and likely delay in getting relief.

These are only examples of the myriad practical and legal difficulties that will confront the Commission if it authorizes discovery beyond that which it has to date allowed in program access proceedings. In view of the practical limitations on the ability of the Commission to effectively ensure the continued confidentiality of commercially sensitive information in program access cases, the Commission should not change its current practices. Instead, the Commission should continue its current practice of authorizing limited discovery in those rare instances

in which discovery is necessary to the resolution of a program access complaint.

V. DAMAGES ARE UNNECESSARY AND COULD SIGNIFICANTLY UNDERMINE THE GOALS OF THE PROGRAM ACCESS RULES.

The Commission has previously determined that damages are neither appropriate nor necessary to the efficacy of the program access rules.[28] No party has provided any basis for reversing that decision. To the contrary, all evidence supports the Commission's original conclusion that damages are unnecessary and inappropriate in program access proceedings.

A. Damages Are Not Necessary To, And Could Actually Reduce, The Efficacy Of The Program Access Rules.

There is absolutely no evidence to suggest that damages are necessary as an added deterrent to program access violations. With at least 68 cable-affiliated national satellite programmers currently in operation, there exist literally thousands of contractual agreements subject to the Commission's program access rules. Yet, since the inception of the rules, only 38 program access complaints have been filed. There has been only one case in which a programmer has been found in violation of the nondiscriminatory pricing restriction and only two cases in which the Commission has found an unreasonable refusal to deal. In

---

[28] Program Access Order, Memorandum Opinion and Order on Reconsideration, MM Docket No. 92-265, 76 R.R. 2d 1085, at ¶ 18 (1994) ("Reconsideration Order").

addition, sixty percent of the program access cases resolved to date have been settled by the parties prior to a Commission decision.[29]

These facts demonstrate that even without the additional remedy of damages, the parties are motivated to come to the bargaining table with MVPDs. Thus, contrary to Ameritech's contentions, there is no evidence to suggest the need for a new incentive to ensure compliance with the rules. Rather, the evidence demonstrates that the rules have been quite effective in deterring violations.

Moreover, the claims of Ameritech and others that damages are necessary to act as a monetary deterrent ignore the current remedies available under the rules which already serve this purpose. Specifically, the Commission already has the ability to impose forfeitures of up to $7,500 per day on programmers found in violation of the rules.[30] This forfeiture power was created for the precise purpose of establishing an effective monetary deterrent to violations of the Commission's rules.[31] Neither

---

[29] At least 18 of the 30 program access complaints resolved to date, or 60%, have resulted in settlement.

[30] See Program Access Order at ¶ 81 (the Commission "may impose sanctions available under Title V of the Communications Act" for violations of the program access rules).

[31] See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order, 8 Comm. Reg. (P & F) at ¶ 19 (setting the forfeiture amounts so that they will "serve as a deterrent and foster compliance with our rules.").

Ameritech nor any other party has provided any reason why this monetary deterrent does not respond to the needs raised in the Notice.[32] Indeed, given that the Commission has never invoked its power to impose forfeitures in a program access case, it is difficult to understand how the new remedy of damages could meet the requirement in Section 628(e)(1) that any program access remedy be "necessary." Thus, without any indication in the record that damages are necessary, the imposition of a damages remedy at this time is clearly unwarranted.[33]

Aside from being unnecessary and inappropriate, a damages remedy could actually reduce the efficacy of the program access rules. At a minimum, a damages remedy would require an additional round of Commission proceedings to determine whether and to what extent damages should be imposed in a particular case. Such additional proceedings would impose significant delays and costs, contrary to the Commission's overriding concern that the program access rules provide an efficient and timely remedy. For these reasons, federal courts have long recognized the public interest in avoiding the substantial and often lengthy

---

[32] See Notice at ¶¶ 8, 12.

[33] See Reconsideration Order at ¶ 18 (stating that the Commission would only adopt a damages remedy if circumstances changed to warrant such an additional remedy).

deliberations involved in determining damages whenever possible.[34]

Finally, it is worth noting that when the Commission adopted the program access rules, it specifically declined to require complainants to show that they had suffered "harm."[35] Ultimately, a determination of damages is inextricably intertwined with the issue of harm since damages are a way of compensating the complainant for harm suffered. Thus, adoption of a damages remedy would likely require the very type of complex showing of "harm" the Commission sought to avoid and, at the same time, call into question the Commission's prior judgment that harm is not a required element of any program access complaint under Section 628(c).

B. Damages Are Particularly Inappropriate Where, As Here, The Case Law Is Nascent And Provides Little Guidance on What Actions Will Or Will Not Result In Liability.

Beyond the problems cited above, there is ample support for declining to impose damages where the law lacks requisite

---

[34] See 28 U.S.C. § 1292(c)(2) (allowing interlocutory appeals of decisions prior to the assessment of damages for the precise purpose of avoiding complex and burdensome damages proceedings). See also Mendenhall v. Barber-Greene Company, 26 F.3d 1573, 1581 (Fed.Cir.), cert. denied, 513 U.S. 1018 (1994) ("The purpose of § 1292(c)(2) is to permit district courts to stay and possibly avoid a burdensome determination of damages.").

[35] Program Access Order at ¶ 47.